Supreme Court, U.S.
FILED

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NO. 95-

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1996

ROBERT L. PEELER, SR.
AND
SANDRA M. SKEEN,
Petitioners

vs.

UNITED STATES OF AMERICA,
Respondent

On Petition for a writ of Certiorari
to the United States Court of
Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Submitted By

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30 pp

QUESTIONS PRESENTED

I.

Is the failure to properly instruct the jury on the "materiality" element of a crime charged under 18 U.S.C. § 1014 reversible constitutional error under United States v. Gaudin, 115 S.Ct. 2310 (1995)?

II

Did the Court of Appeals err in not vacating conviction due to bias and prejudice based upon District Judge's failure to disclose personal and family known conflicts of interest? Is 28 U.S.C. § 455A applicable in this case, requiring the disqualification and recusal sua sponte of the District Judge?

LIST OF PARTIES OF INTEREST

Ashmore, Beattie B.
Herlong, Henry M., Jr.
Josey, J. Rene
Lucius, William C.
Luttig, J. Michael
Motz, Diana G.
Murnaghan, Francis D.
Peeler, Robert L.,Sr.
Skeen, Sandra M.
Wilkinson, J. Harvie

This is to certify that the above is a list of the attorneys, the trial judge, Court of Appeals Judges and petitioners all of whom are interested parties to the proceeding. Done to the best of the petitioners' abilities this 29th day of August, in the Year of our Lord and Saviour Jesus Christ, Nineteen Hundred Ninety-Six.

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Appendix A - Opinion of the United States Court of Appeals, Fourth Circuit, June 3, 1996

OPINION BELOW

The opinion and judgment of the Fourth Circuit Court of Appeals entered June 3, 1996 is reprinted in the Appendix at 1a.

STATEMENT OF JURISDICTION

The judgment and opinion of the Fourth Circuit, affirming a judgment of conviction and sentence of the United States District for South Carolina, was entered on June 3, 1996. App. 1a. This petition for certiorari is being filed within 90 days of the June 3, 1996 opinion and judgment. Motion for Seven-Day Enlargement of Time for Petition for Rehearing or Suggestion for Rehearing En Banc was denied June 24, 1996. The Fourth Circuit Court of Appeals had jurisdiction pursuant to Title 28 U.S.C.§ 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of

> law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, ad to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of Counsel for his defense.

Statutory Provision

Title 18 U.S.C. § 1014 provides

> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation or a company the corporation reinsures, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers Home Administration, the Rural Development Administration, any Farm Credit Bank, production credit association, agricultural credit association, bank for cooperatives, or any division,

officer, or employee thereof, or of any regional agricultural credit corporation, established pursuant to law or of the National Agricultural Credit Corporation, a Federal land bank, a Federal land bank association, a Federal Reserve Bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, any Federal home loan bank, the Federal Housing Finance Board, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Farm Credit System Insurance Corporation, or the National Credit Union Administration Board, a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978, or an organization operating under Section 25 or Section 25(a) of the Federal Reserve Act, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise or the acceptance, release or substitution of security therefore shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Title 18 U.S.C. § 152 provides:

A person who -

(1) Knowingly and fraudulently conceals from a custodian, trustee, marshall or other officer of the court charged with the control or custody of property, or in connection with a case under Title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;

(2) Knowingly and fraudulently makes a false oath or account in or in relation to any case under Title 11;

(3) Knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of Title 28, in or in relation to any case under Title 11;

(4) Knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under Title 11 in a personal capacity or as or through an agent proxy, or attorney;

(5) Knowingly and fraudulently receives any **material** amount of property from a debtor after the filing of a case under Title 11, with intent to defeat the provisions of Title 11;

(6) Knowingly and fraudulently gives, offers, receives, or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof for acting or

forbearing to act in any case under Title 11;

(7) In a personal capacity or as an agent or officer of any person or corporation in contemplation of a case under Title 11, by or against the person or any other person or corporation, or with intent to defeat the provisions of Title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation;

(8) After the filing of a case under Title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies or makes a false entry in any recorded information (including books, documents, records and papers) relating to the property or financial affairs of a debtor; or

(9) After the filing of a case under Title 11, knowingly and fraudulently withholds from a custodian, trustee, marshall, or other officer of the court, or a United States Trustee entitled to its possession, any recorded information (including books, documents, records and papers) relating to the property or financial affairs of a debtor,

Shall be fined not more than $5,000, imprisoned not more than 5 years, or both.

(Underline added by Petitioners for emphasis).

STATE OF THE CASE AND THE FACTS

A. The Procedural History, Charges. Conviction and Sentence

Petitioner Robert L. Peeler, Sr. for 15 years successfully owned Carolina Leasing, Inc., an automobile leasing company in South Carolina. Petitioner Sandra M. Skeen served as a Vice President and Office Manager. An impending merger with Wachovia Bank prompted South Carolina National Bank to "**call**" a $1,000,000 (One Million Dollars) inventory-floorplan line of credit. Even though Carolina Leasing had a 15 year history of a perfect record meriting all credit lines being renewed and/or increased by South Carolina National Bank for 15 consecutive years ultimately reaching $11,000,000 (Eleven Million Dollars) the line was still "**called**". Clearly, South Carolina National Bank was not in compliance with the Office of the Comptroller of Currency due to South Carolina National Bank's failure in never physically verifying the bank's collateral or making a personal on-site inspection throughout the duration of that particular line's four year existence.

This resulted in financial chaos leading to the filing of bankruptcy in August of 1991 under Chapter 11 of the Bankruptcy Code.

South Carolina National Bank/Wachovia selected an out-of-state individual who had never been a trustee before as the bank's choice to act as trustee. Criminal complaints have been filed against the trustee and his attorney involving Fraudulent Concealment, Concealment of Assets, Obstruction of Justice, Breach of Fiduciary Trust With Fraudulent Intent and Perjury . . . all on record with the United States Attorney's Office, District of South Carolina. Additionally, the trustee

interpreted as "irregularities" selected transactions which in fact had been an accepted long-standing bank practice and "course of conduct" by South Carolina National Bank spanning over 15 years. South Carolina National Bank's loan covenants stipulated prior-approval by the bank. Upon bank approval, the bank processed all loans making direct-deposits into Petitioner Peeler's Companies bank accounts. These facts are in the record.

Petitioners Peeler and Skeen were charged with 18 U.S.C. § 1014 (Counts One through Nine) making material false statements on loan applications with banks insured by the F.D.I.C. and 18 U.S.C. § 152 (Counts Ten and Eleven) fraudulently withholding documents relating to a debtor's assets from the bankruptcy trustee and withholding, concealing and falsifying certain bankruptcy records.

A jury convicted Peeler on all counts; Skeen was convicted of Counts One through Ten. Peeler was sentenced to sixty-three months imprisonment on Counts One through Nine and Sixty months on Counts Ten and Eleven. The Court did not impose a fine or require restitution. Petitioner Skeen was sentenced to forty months imprisonment. Both timely appealed.

Petitioners' Attorneys filed a Brief pursuant to Anders v. California, 386 U.S. 738 (1967). Petitioners Peeler and Skeen were both notified of their right to file supplemental briefs pro se, which they jointly did.

Their appeals were denied by the Fourth Circuit Court of Appeals on June 3, 1996. A seven-day avoidable delay in Petitioners receipt of notification of that denial was caused by the Court of Appeals' error in mailing same to Petitioners' former counsel

rather than mailing denial direct to Petitioners who had filed pro se upon advisement of their right to do so by the Court of Appeals. The very Court which advised Petitioner's their right to file pro se, denied Petitioners motion to grant a reimbursing "off setting seven-day enlargement of time to file a Petition for Rehearing or Suggestion for Rehearing En Banc. The exact same seven days "lost" due to the Court's mailing error causing the seven-day delay.

B. The Trial Court's Instructions to the Jury on "Materiality".

The Trial Court instructed the jury on the elements of Title 18 U.S.C. § 1014 as follows:

> Now, there are four essential elements which comprise the crime. The Government must prove beyond a reasonable doubt, first, that the defendant made a false statement to a federally insured bank. Second, that the defendant did so for the purpose of influencing the bank's action. Third, that the statement was false as to a material fact. And fourth, that the defendant made the false statements knowingly.
>
> The word "false" means contrary to the truth. As used in law, the word "false" generally means more than an innocent mistake or a simple error of fact. A statement or representation is false if it was untrue when made and was then known to be untrue by the person making it or causing it to be made, or made or caused to be made with reckless indifference as to its truth or falsity.
>
> Now, *the court has determined as*

> *a matter of law that the statements which the Government has alleged the defendants made in their dealings with the various banks would involve material facts.* Therefore, the only part of the third element that you must decide is whether those statements, if made, were false.
>
> (Underline and Italics added by Petitioner for emphasis)

Pages 11 and 12 of Jury Charge

This Court then charged and instructed the Jury on the bankruptcy counts as follows:

> Section 152 of Title Eighteen of the United States Code provides in part that, "Whoever, after the filing of a case under Title Eleven, knowingly and fraudulently withholds from a custodian, trustee, marshall or other officer of the court entitled to its possession any recorded information, including books, documents, records and papers relating to the property and the financial affairs of a debtor, shall be guilty of an offense against the United States."
>
> To sustain the charge of withholding records after filing a case in bankruptcy, the Government must prove the following elements beyond a reasonable doubt. And here again, there are four elements. First, that a bankruptcy proceeding existed. Second, the defendant withheld from the trustee or an officer of the court entitled to its possession any recorded

information, documents, records or papers. Third, such recorded information, documents, records or papers related to the property or financial affairs of the debtor. And fourth, the defendant withheld such recorded information, documents, records or papers knowingly and fraudulently.

Title 18, United States Code, Section 152 also provides that "Whoever, after the filing of a case under Title Eleven, or any contemplation therefore, knowingly and fraudulently conceals, destroys, mutilates, falsifies or makes a false entry in any recorded information, including books, documents, records and papers relating to the property or financial affairs of a debtor, shall be guilty of an offense against the United States."

There are four essential elements which comprise this crime. The Government must prove beyond a reasonable doubt, first, that a bankruptcy proceeding existed; second, that a defendant falsified or made or caused to be made a false entry in any book, record, paper or document or documents; that such document related to the property or financial affairs of the debtor; and that the defendant made the false entries or caused them to be made knowingly and fraudulently.

Pages 12, 13 and 14 of Jury Charge

REASONS FOR GRANTING THE WRIT

I.

IS THE FAILURE TO PROPERLY INSTRUCT THE JURY ON THE "MATERIALITY" ELEMENT OF A CRIME CHARGED UNDER, 18 U.S.C. § 1014 REVERSIBLE CONSTITUTIONAL ERROR UNDER *UNITED STATES V. GAUDIN* 115 S.Ct. 2310 (1995)?

Petitioners counsel did not object to the Court's instructions. Petitioners were convicted March 10, 1994. On April 18, 1995 Petitioners' then counsel filed an Anders brief in this matter. On June 19, 1995 this court in the case of *United States v. Gaudin*, 115 S.Ct. 2310 (1995) concluded that a jury, not a Judge, should determine "materiality" in a false statement case. The Gaudin court determined to do otherwise violated a Defendant's right to a full jury trial under the Fifth and Sixth Amendments to the United States Constitution. *Gaudin* at 2312. See *Sullivan v. Louisiana* S.Ct. 2078 (1993).

Prior to the trial of this case, the Fourth Circuit held not only that "materiality" was an element of 18 U.S.C. § 1014, *United States v. Bonnette*, 663 F.2d 495 (4th Circuit 1981).

The Fourth Circuit has held that whether a false statement was material was a matter of law for the court, not the jury. Therefore, it would have been futile for the Petitioners to object to the Trial Court's "materiality" determination.

Recently, the Fourth Circuit held that to remove the "materiality" issue from the Jury's consideration was plain error. *United States v. David*, Fed 638 (4th Circuit, 1996).

The Fourth Circuit also reversed the robbery conviction of William Calvin Johnson when the Trial Court instructed the Jury that

the Credit Union that Johnson robbed was Federally insured.* *United States v. Johnson*, 58 Crl 1252 (12-20-95). The Fourth Circuit correctly followed this court's rulings that every element of the crime charged is for the jury, not the Court, to determine.

"While a Judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, the Judge may not direct a verdict for the government no matter how overwhelming the evidence of guilt." *Sullivan* at 2080.

"The right to a Jury trial includes, of course, as its most important element, the right to have a Jury, rather than the Judge, reach the requisite finding of guilty"

In re *Winship*, 397 U.S. 358 at 361 (1970); *Patterson v. New York*, 432 U.S. 197 at 204 (1977).

Recently, this Court, in a case strikingly similar to Petitioners' case, remanded the matter back to the Fifth Circuit for further consideration in light of the *Gaudin* decision.

Thomas Waldron was convicted on 6 counts of violating 18 U.S.C. § 1014. Waldron, at trial, did not object to the trial court's instructions that "materiality" had been proven.

The Fifth Circuit affirmed Waldron's convictions, rejecting on appeal that the issue of "materiality" was for the Jury. See, *United States v. Waldron*, 53 Fed 680 (5th Circuit, 1995). Mr. Waldron sought and was granted relief by this court by way of

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* Whether the Credit Union was Federally insured is an element of the crime. See 18 U.S.C. § 2113.

remanding the matter back to the Fifth Circuit Court of Appeals. See *Waldron v. United States*, 116 S.Ct. 333, 133 L. ed 2d 233 (1995).

Since the conviction of your Petitioners has not reached "finality" under *Griffith v. Kentucky* 479 U.S. 314 (1987), your Petitioners are without exception, entitled to receive the benefit of this Court's decision on *Gaudin*.

II.

DID THE COURT OF APPEALS ERR IN NOT VACATING CONVICTION DUE TO BIAS AND PREJUDICE BASED UPON DISTRICT JUDGE'S FAILURE TO DISCLOSE KNOWN PERSONAL AND FAMILY CONFLICTS OF INTEREST? IS 28 U.S.C. § 455A APPLICABLE IN THIS CASE, REQUIRING THE DISQUALIFICATION AND RECUSAL SUA SPONTE, OF THE DISTRICT JUDGE?

The appeals Court should have vacated sentence because of the obvious bias and prejudice of Judge Henry M. Herlong, Jr., the presiding Judge at Defendant's trial.

Herlong should have sua sponte recused himself because he had prejudiced interests in the case, to wit:

1. The Judge, himself
2. His Daughter
3. His Son
4. Clemson University Associate Athletic Director

All four had a common bond and mutual interest in Clemson University. Clemson University, Clemson, South Carolina, was at the very heart of four counts of an eleven count indictment.

The District Judge, Henry Michael Herlong, Jr., is a Clemson University graduate '67. Judge Herlong also played football at Clemson University.

Judge Herlong's daughter, Faris Elizabeth Herlong, is presently enrolled at Clemson University.

Judge Herlong's son, Henry Michael Herlong, III, is presently enrolled at Clemson University.

Clemson University Associate Athletic Director, S. Leonard Gough, was a key witness for the Plaintiff.

The witness, Clemson University Associate Athletic Director Gough, testified under oath in sworn testimony before Clemson University Alumnus, Henry M. Herlong, Jr., the presiding Judge.

Clemson University's Gough testified that he was a "non-compensated" employee of an automobile dealership, providing a Clemson Car Donor vehicle to the witness, Gough.

Clemson University's Gough testified that he was a "noncompensated" employee of an automobile dealership {Clemson Car Donor] for the sole purpose of obtaining insurance coverage on the courtesy vehicle he was provided.

Clemson University's Gough confessed to an admission of insurance fraud - in the presence of the presiding Judge, Henry M. Herlong, Jr., Clemson Graduate Class of '67, and father of daughter and son, both of whom are enrolled as students at Clemson University.

This resulted in Judge Herlong's failure to call the Jury's attention to the obvious perjury and admitted insurance fraud by Clemson's Gough during his testimony against the Petitioners.

Judge Herlong's open support of Clemson's S. Leonard Gough's fraudulent testimony and

fraudulent activities in front of the Jury due to Herlong's and Gough's Clemson conflict was to the detriment of the Petitioners because it indicated directly to the Jury that Petitioners were guilty and not telling the truth.

Judge Herlong had a responsibility to notify the South Carolina Insurance Commissioner of Clemson's Gough's admitted confession to insurance fraud . . . a felony. Judge Herlong did not. The Petitioners did.

The Petitioner also filed a Misprision of Felony 18 U.S.C. § 4 against Herlong with Chief Judge J. Harvie Wilkinson, III and South Carolina Attorney General Charles Molony Condon.

The District Judge had a duty to make full disclosure on matters of disqualification, which Herlong did not in violation of 28 U.S.C. § 455A.

> "Any justice, judge or magistrate of the United States shall disqualify himself in any proceedings in which his impartiality might reasonably be questioned."

Conspicuously, the Fourth Circuit Court of Appeals failed to address this influencing and critical issue in the Court's June 3, 1996 opinion; even though the Appeals Court was fully apprised of Herlong's conflict and questionable impartiality in a December 10, 1995 Addendum to brief which even included Clemson Annual photo copies of Herlong in Class of '67 in addition to current Clemson class photos of Herlong's daughter and son.

CONCLUSION

The Petitioners are aware that this Court has accepted the cases of *U.S. v. Wells* and *U.S. v. Lopez*, 59 Cvl 3072 (6-12-96) to determine whether "materiality" is, in fact, an element of 18 U.S.C. § 1014.

However, whatever this Court's conclusion in these companion cases is, that decision should not affect the Petitioners' position because, in this case, the damage has already been done. The Trial Court directed a verdict against the Petitioners as to one of the four elements of 18 U.S.C. § 1014, i.e. "materiality".

The bell cannot be unrung.

The District Judge, Henry M. Herlong, Jr., unfairly compromised the judicial ethics of the court when he favored his alma mater, Clemson University, over the responsible conduct of the court.

The judge himself, the judge's daughter and the judge's son, and a key witness have an interest in the subject matter - Clemson University - in controversy or in a parity to the proceedings, or any other interest that could be substantially affected by the outcome of the proceeding, it would be unnatural and emotional departure of extreme s to reasonably expect the judge or anyone for that matter to remain impartial, thus creating an impossibility to render unto the defendants a "fair trial".

"No right ranks higher than the right of the accused to a fair trial." *Press-Enterprise v. Supreme Court of California*, 464 U.S. 501 at 508.

For the foregoing reasons, it is requested that the writ of certiorari please be granted.

Respectfully submitted,

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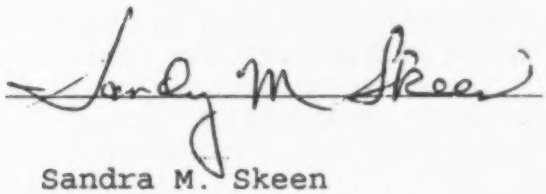
and



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Unpublished
United States Court of Appeals
For the Fourth Circuit

United States of America Plaintiff-Appellee v. Sandra M. Skeen Defendant-Appellant	No. 94-5938

United States of America Plaintiff-Appellee v. Robert L. Peeler, Sr. Defendant-Appellant	No. 94-5955

Appeals from the United States District Court
for the District of South Carolina at Anderson
Henry M. Herlong, Jr. District Judge.
(CR-93-165)

Submitted: May 21, 1996

Decided: June 3, 1996

Before MURNAGHAN, LUTTIG, and MOTZ, Circuit Judges

Affirmed by unpublished per curiam opinion.

COUNSEL

Oscar William Bannister, Jr., D. Garrison Hill, HILL, WYATT, BANNISTER & BROWN, LLP, Greenville, South Carolina;

Albert Q. Taylor, Jr., TAYLOR & HENRY, Greenville, South Carolina for Appellants. William Corley Lucius, Assistant United States Attorney, Greenville, South Carolina, for Appellee.

Unpublished opinions are not binding in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Robert Peeler, Sr. and Sandra Skeen appeal from their convictions of making material false statements on loan applications with banks insured by the FDIC (18 U.S.C.A. §§ 1014,2)(West 1976 & Supp.1996) (Counts One through Nine) and knowingly and fraudulently withholding documents relating to a debtor's assets from the bankruptcy trustee (18 U.S.C.A. § 152)(West 1969 & Supp. 1996)(Count Ten). Peeler also appeals from his conviction of withholding, concealing, and falsifying certain bankruptcy records (18 U.S.C. § 152)(Count Eleven). Their attorney has filed a brief pursuant to *Anders v. California*, 386 U.S. 738(1967), noting three issues regarding sentencing but stating that, in his view, there are no meritorious issues for appeal. Peeler and Skeen were both notified of their right to file supplemental pro se briefs. Only Peeler has done so.

Peeler owned Carolina Leasing, Inc., an automobile leasing company, and Skeen served as its vice president and office manager. Carolina Leasing filed for bankruptcy under Chapter 11 of the Bankruptcy Code in August 1991. During the course of those proceedings, the bankruptcy trustee found a number of irregularities in Carolina Leasing's finances. An investigation by the United States Attorney

and the FBI ultimately resulted in a twelve-count indictment against Peeler and Skeen (the Defendants).[1]

The indictment charged the Defendants with submitting false loan applications to FDIC-insured banks (Counts One through Nine) by (1) misrepresenting that vehicles pledged as collateral were unencumbered when, in fact, they had been pledged as collateral to another financial institution; (2) submitting falsified lease agreements to pledge as security for loans on vehicles; (3) submitting falsified purchase agreements for certain vehicles; and (4) overstating the value of vehicles pledged as security. The indictment also charged the Defendants with fraudulently withholding from the bankruptcy trustee certain books and records of Carolina Leasing (Count Ten). Finally, the Defendants were charged with fraudulently concealing from the trustee and creditors of the estate the diversion of assets from the bankruptcy estate. A jury convicted Peeler on all counts; Skeen was convicted on Counts One through Ten. Peeler was sentenced to sixty-three months imprisonment on Count One through Nine, and sixty months imprisonment on Counts Ten and Eleven, to be served concurrently. Skeen was sentenced to forty months imprisonment. Both have timely appealed.

Peeler's and Skeen's counsel first challenges the amount of loss attributable to them in determining their sentences. Under USSG § 2F1.1[2] (Fraud and Deceit), each of the Defendants was assigned a base offense level

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[1] Count Twelve was dismissed on motion of the Government prior to trial.

[2] United States Sentencing Commission, *Guidelines Manual* (Nov. 1990).

of six. Pursuant to § 2f1.1(b), the specific offense characteristics, the offense level is increased according to the monetary loss involved. "Loss," as the term is used in the guidelines, includes "intended, probable or otherwise expected loss." *United States v. Baum*, 974 F.2d 496, 499 (4th Cir. 1992). In bank fraud cases, loss is measured as the potential consequences of default, rather than the amount of the loan, less the value of any security interest and any payments made by the defendant. Id.; *see also United States v. Rothberg*, 954 F.2d 217 (4th Cir. 1992). The district court's determination of the amount of loss is reviewed for clear error, Id. at 219.

The government produced detailed evidence at the sentencing hearing to support the district court's findings that Peeler was responsible for an actual loss of $5,624,408.82. Finding that Skeen was slightly less culpable than Peeler, the district court determined that she was responsible for an actual loss of between $2,500,000 and $5,000,000. Our review of the record reveals that the district court did not clearly err in these findings.

Second, counsel raises two claims regarding Skeen's sentence; the district court's denial of her request for a two-point reduction for acceptance of responsibility (USSG § 3E1.1) and the denial of her request for a two-point reduction for minimal role in the offense (USSG § 3B1.2). The adjustment for acceptance of responsibility is not intended to apply to a defendant who contests his factual guilt at trial, U.S.S.G. § 3E1.1, comment. (n.2) *See United States v. Muldoon*, 931 F.2d 282 (4th Cir. 1991) (absent rare circumstances, USSG § 3E1.1 precludes a downward adjustment for acceptance of responsibility where a defendant exercises his constitutional right to a trial). Moreover, the burden is on the

defendant to establish by a preponderance of the evidence that he is entitled to the adjustment. *United States v. Urrego-Linares*, 879 F.2d, 1234, 1239 (4th Cir.), *cert. denied*, 493 U.S. 943 (1989). Whether the reduction is warranted "is primarily a factual question, and due deference for the sentencing court requires an appellate court to accept its findings unless they are clearly erroneous." *United States v. Cusack*, 901 F.2d,29,31 (4th Cir. 1990). The district court denied Skeen's request primarily on the grounds that she had not accepted responsibility prior to the sentencing hearing. Because timeliness of admission of responsibility is a factor which the district court may consider, *United States v. Jones*, 31 F.3d 1304 (4th Cir. 1994) and because Skeen did not unambiguously acknowledge her criminal conduct, *United States v. Castner*, 50 F.3d 1267, 1280 (4th Cir. 1995), the district court did not clearly err in denying her the adjustment.

Secondly, Skeen's counsel claims that the district court erred in denying her an adjustment for being a minimal participant, USSG § 3B1.2. A minimal participant is among the least culpable of those involved, as shown by his lack of understanding of the scope and structure of the activities of the others involved. USSG § 3B1.2, comment (n.1). The "critical inquiry is whether the defendant's conduct is material or essential to commission of the offense." *United States v. Palinkas*, 938 F.2d 456 (4th Cir. 1991), *vacated*, 503 U.S. 931 (1992), *reinstated*, 977 F.2d 905 (4th Cir 1992). The district court's determination of whether the defendant had a minimal or minor role is essentially a factual question, reviewed for clear error, *United States v. Daughtrey*, 874 F.2d 213, 218 (4th Cir. 1989). The evidence at trial established that Skeen was involved in all aspects of the day-to-day running of Carolina Leasing, that she shared

an office with Peeler, and that the two of them had worked together for fifteen years. Accordingly, we will not disturb the district court's finding that Skeen was neither a minor or minimal participant in the offenses.

Peeler has filed a supplemental pro se brief raising five broad claims. First Peeler alleges that the district court judge displayed "prejudicial and biased conduct" during the trial and that his motions for a mistrial and for a new trial on those grounds were improperly denied. Our review of the transcript of the trial reveals no excessive intervention by the judge, *Anderson v. Warden, Md. Penitentiary*, 696 F.2d 296 (4th Cir. 1982) or any improper commentary on the evidence, *United States v. Tello*, 707 F.2d 85 (4th Cir. 1983). Accordingly, we find these claims to be without merit.

Second, Peeler alleges that several of the government's witnesses were "biased and influenced" through various "favors" and "preferential treatment" issued by the banks and the bankruptcy trustee. Again, our review of these claims and the evidence submitted by Peeler in support thereof reveals that these claims are without merit.

Third, Peeler raises a number of claims alleging that he was denied effective assistance of counsel. Because ineffective assistance does not conclusively appear on the face of the record, however, Peeler's ineffective assistance claim must be brought by motion under 28 U.S.C. §2255 (1988) and not on direct appeal. *United States v. Fisher*, 477 F2.d 300, 302 (4th Cir. 1973); see also *United States v. DeFusco*, 949 F.2d 114, 120 (4th Cir. 1991), *cert. denied*, 503 U.S. 977 (1992).

Peeler's fourth claim is entitled "Evidentiary

Facts and Findings", but points to no specific evidentiary rulings by the district court. Rather, Peeler makes four statements explaining facts adduced at his trial, none of which states a claim.

Finally, Peeler claims that the district court improperly overruled his objections to the amount of loss as calculated in the presentence report. We have already concluded that the district court's finding on this issue was not clearly erroneous; accordingly, these claims are without merit.

In accordance with *Anders* we have examined the entire record in these cases and find no other meritorious issues for appeal. We therefore affirm the convictions and sentences. This court requires that counsel inform his clients, in writing, of their right to petition the Supreme Court of the United States for further review. If the client requests that a petition be filed, but counsel believes that such a petition would be frivolous, then counsel may move in this court for leave to withdraw from representation. Counsel's motion must state that a copy thereof was served on the client. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

Supreme Court, U.S.
FILED
JAN 2 1997
CLERK

No. 96-680

In the Supreme Court of the United States

OCTOBER TERM, 1996

SANDRA M. SKEEN AND ROBERT L. PEELER, SR.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in a prosecution under 18 U.S.C. 1014 for making false statements to federally insured banks, the district court erred by declining to submit the issue of the materiality of the false statements to the jury.

2. Whether the district judge was required to recuse himself from petitioners' trial because he and members of his family attended the same university where one of the witnesses worked.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is unpublished, but the decision is noted at 86 F.3d 1154 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1996. The petition for a writ of certiorari was filed on September 3, 1996 (a Tuesday following a federal holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of South Carolina, petitioner

Peeler was convicted on nine counts of making false statements to federally insured banks for the purpose of influencing the actions of those banks, in violation of 18 U.S.C. 1014, and two counts of bankruptcy fraud, in violation of 18 U.S.C. 152. He was sentenced to 63 months' imprisonment, to be followed by five years' supervised release. Peeler Judgment at 1-4. Petitioner Skeen was convicted on eight counts of making false statements to federally insured banks for the purpose of influencing the actions of those banks, and one count of bankruptcy fraud. She was sentenced to 40 months' imprisonment, to be followed by three years' supervised release. Skeen Judgment at 1-4. The court of appeals affirmed. Pet. App. 1a-7a.

1. In 1975, petitioner Peeler founded Carolina Leasing, Inc. (Carolina Leasing), which operated as an automobile leasing company. Petitioner Skeen was Vice President of Carolina Leasing. Subsequently, Peeler spun off several businesses from Carolina Leasing, and those businesses also employed Skeen. In August 1991, three of Peeler's companies filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code, and a trustee was appointed. In early 1992, the bankruptcy trustee reported that he suspected bankruptcy fraud on the part of Peeler's companies. The matter was referred to the United States Attorney's Office and the FBI. Peeler Presentence Report (PSR) at 6-7.

Investigation into petitioners' activities revealed that they had made false statements to federally insured banks. In applying for bank loans, petitioners presented falsified invoices reflecting overvaluation of the purchase price of automobiles owned by Carolina Leasing. PSR at 9-10.

In addition, Peeler had obtained a loan in the amount of $36,617.48 from South Carolina National Bank by falsely representing that he had a lease agreement with Clemson University to lease automobiles to the coaching staff. He provided forged lease agreements purportedly signed by the assistant athletic director at Clemson. PSR at 10. At trial, the government called Len Gough, former assistant athletic director at Clemson. Gough testified he never entered into a lease arrangement with Peeler but instead provided Peeler with a sky box at Clemson's Death Valley in exchange for the use of automobiles owned by Carolina Leasing, Inc. Gough denied signing the lease agreements used by Peeler to obtain the loan. *Ibid.*

2. With respect to the false statements counts charging violations of 18 U.S.C. 1014, the district court gave the following jury instructions:

> Title Eighteen, United States Code, Section 1014 reads in relevant part, and I quote, "Whoever knowingly makes any false statements or report or willfully overvalues any land, property or security for the purpose of influencing in any way the action of any institution, the accounts of which are insured by the Federal Deposit Insurance Corporation, upon any application, advance, discount, purchase agreement, repurchase agreement, commitment or loan or any change or extension of any of the same by renewal, deferment of action or otherwise or the acceptance, release or substitution of security therefore shall be guilty of a crime against the United States."

> Now, there are four essential elements which comprise the crime. The Government must prove beyond a reasonable doubt, first, that the defendant made a false statement to a federally insured bank. Second, that the defendant did so for the purpose of influencing the bank's action. Third, that the statement was false as to a material fact. And fourth, that the defendant made the false statements knowingly.
>
> * * * * *
>
> Now, the court has determined as a matter of law that the statements which the Government has alleged the defendants made in their dealings with the various banks would involve material facts. Therefore, the only part of the third element that you must decide is whether those statements, if made, were false.

Transcript of Jury Charge at 10-12. Petitioners did not object to the decision by the court to rule on the materiality of the false statements. Pet. 11.

3. Petitioners filed a notice of appeal, and their counsel filed a brief in the court of appeals pursuant to *Anders* v. *California*, 386 U.S. 738 (1967). Counsel informed the court that he believed petitioners had no meritorious issues on appeal. The brief, however, highlighted three issues pertaining to sentencing for the court's consideration. Petitioner Peeler filed a supplemental brief complaining of numerous errors at trial and sentencing, including prejudicial and biased conduct by the district court, error in denial of a motion for mistrial, and ineffective assistance of counsel. The court of appeals rejected all of petitioners' claims. Pet. App. 1a-7a. Petitioners did not

raise on appeal the claims they present in the instant petition.

ARGUMENT

1. Petitioners contend (Pet. 11-13) that the materiality of the false statements is an element of the offenses charged under 18 U.S.C. 1014, and therefore that the district court should have submitted that issue to the jury. On November 4, 1996, this Court heard oral argument in *United States* v. *Wells*, No. 95-1228. That case presents the question whether the materiality of a false statement or report is an element of the offense described by Section 1014. On November 15, 1996, the Court granted the petition for certiorari in *Johnson* v. *United States*, No. 96-203. That case presents the issue whether, when a defendant fails to object at trial to the failure to submit the element of materiality to the jury, a court of appeals should affirm the judgment under the plain error rule, Fed. R. Crim. P. 52(b), when no reasonable jury would have found the false statement to be immaterial.

It is unnecessary, however, for the Court to hold this petition pending the decisions in *Wells* and *Johnson*. Because petitioners did not object at trial or on appeal to the court's failure to submit the issue of materiality to the jury, the claim is not properly asserted here absent exceptional circumstances. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); see *Department of Revenue of Montana* v. *Kurth Ranch*, 511 U.S. 767, 772 n.9 (1994); *United States* v. *Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994); *United States* v. *Williams*, 504 U.S. 36, 40-41 (1992). Petitioners have shown no exceptional circumstances.

2. Petitioners also contend for the first time (Pet. 13-15) that the district judge had a conflict of interest

that should have prevented him from hearing their case. Petitioners argue that because the trial judge and his children attended Clemson University, the judge was unable to consider impartially the testimony of Gough concerning the Clemson leases. Thus, they argue that the trial judge was required to recuse himself from consideration of this case pursuant to 28 U.S.C. 455(a). That statute provides: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." That fact-bound issue does not merit this Court's review.

The fact that the trial judge and his children attended Clemson University does not establish that the judge was biased in the matter of the Clemson leases. The status of an alumnus of a university does not involve an affiliation that would lead a reasonable observer to conclude that a judge would be incapable of impartiality in matters in which the university is implicated. In any event, having also failed to raise this matter at trial or in the court of appeals, petitioners cannot do so before this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1997